ESO 1283
AGDEX
April, 1986
OAL-008

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MAJOR CHANGES IN OHIO'S WORKERS' COMPENSATION COVERAGE

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Farmers and agribusiness firms are often in the position of employer supervising anywhere from one to several employees. Workers' compensation is but one of the many concerns these employers must face. Recently, the Ohio Supreme Court and the United States District Court for the Northern District of Ohio have handed down rulings jeopardizing the security workers' compensation was designed to provide.1

BACKGROUND

The purpose of Ohio's workers' compensation law has always been to ensure that compensation for injuries sustained in the course of employment be regarded as a charge upon the business and that payment be made through a speedy and inexpensive process as a substitute for previously unsatisfactory methods.2 As a result, workers' compensation has come to be regarded by employers as a cost of doing business and as an employee insurance program for work-related injuries.

1Jones v. V.I.P. Development, 15 Ohio St.3d 90 (1984)
Davis v. Rockwell International, 596 F.Supp 780 (N.D.,Ohio,1984)

2 58 O Jur 2d Workmen's Compensation Sec. 3

The "old" workers' compensation law was regarded by the courts as a substitute for the common law cause of action against an employer for injuries sustained by an employee in the course of employment. Workers' compensation was never designed to shield an employer from liability for intentionally harmful acts, but was designed to provide a pool from which recovery could be collected without the time delay, legal dificulties, and financial burdens inherent in the traditional common law remedies.3

Prior to the enactment of workers' compensation, employees had to sue the employer to obtain compensation for work-related injuries unless the employer paid voluntarily. Before the recent court decisions, an employer could only be held liable for monetary damages in addition to workers' compensation benefits if the employee could prove a specific intent on the part of the employer to harm a particular employee in a particular manner.4 This was a dificult standard to meet and, in effect, shielded the employer from damage claims in addition to workers compensation except under the most serious circumstances. When the standard was met, however, the employer could be forced to respond in damage payments for these intentional acts.

The employer benefitted from this program because it provided stability and predictability to the settlement of work-related injuries. The employer would either pay a premium to a state fund from which benefits were awarded or could be

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[3]Art. II; Sec. 35 Ohio Constitution
Roof v. Velsicol, 380 F.Supp 1373 (N.D.,Ohio, 1974)
[4]Jones v. V.I.P. Development, 15 Ohio St.3d 90, 95 (1984)

self-insured and pay only the amount specified upon each claim by the workers' compensation board of review. In return, the employer was protected from unlimited liability for work-related injuries.

The employee also benefitted from the workers' compensation law. The employee only needed to make an application to the workers' compensation board of review on a valid claim to receive adequate compensation. This eliminated the need to go through the dificulties of a lawsuit to obtain the needed funds. In addition, the employee could sue the employer at common law for injuries sustained as a result of the employer's intentionally harmful act if able to prove the requisite specific intent. This "quid pro quo" provided the basis upon which workers' compensation flourished for some seventy years prior to 1982.[5]

Generally, the workers' compensation law in Ohio provides that workers' compensation awards "shall be in lieu of all other rights to compensation or damages", and an employer who pays the specified amounts shall not be liable to respond in damages at common law.[6] This is what is known as the exclusivity rule of workers' compensation.

Recently, a liberalized view of this exclusivity rule has developed in Ohio that threatens to upset the balance of the workers' compensation system and to undermine the protection

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[5]Quid pro quo: Used in law for the giving of one valuable thing for another; mutual consideration.
Black's Law Dictionary 1123 (5th ed. 1979).

[6]Art. II; Sec. 35 Ohio Constitution

initially provided by the legislature. While the employee is still provided with the speedy and inexpensive remedy of workers' compensation, the employer is no longer provided the protection from unlimited liability nor the stability and predictability of the old system.

RECENT DEVELOPMENTS

Two recent cases on this issue have redefined the standard of intent and have led to the relaxation of the exclusivity rule.[7]

Jones was a consolidation of three similar lawsuits. In the first action, a city power plant employee died of injuries sustained in the course of his employment. The discharge chute he was responsible for keeping clear of dust accumulation initially had a safety cover on it that was removed by the defendant/employer. In an effort to remove coal accumulation, his hand became caught in the chute. He subsequently died of the injury.

After a jury verdict for the plaintiff/employee for $125,000, an appeals court reversed judgment stating the plaintiff had failed to show that the employer's acts were intentional. The court further ruled that the receipt of workers' compensation benefits precluded the recovery of common law damages.[8]

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[7]Jones v. V.I.P. Development, 15 Ohio St.3d 90 (1984).
Davis v. Rockwell International, 596 F.Supp 780 (N.D.,Ohio,1984)

[8]Gains v. City of Painesville, Case No. 84-339

In the second of the three consolidated actions, the plaintiffs were injured when the boom of the hydraulic excavator they were operating came into contact with a high voltage electric power line. Both were seriously injured, applied for, and received, workers' compensation benefits. The case was dismissed when the court determined there was no issue in controversy for a jury to decide.9

In the third action, the plaintiff's alleged that they were exposed to toxic chemical fumes and that they sustained serious injuries as a result. They also complained that their employer knew of the exposure and its harmful nature, but repeatedly assured them that the exposure was not dangerous.

The jury awarded the plaintiffs $43,000 compensatory and $5000 punitive damages. The court of appeals reversed stating the plaintiffs had failed to show that the employer knowingly subjected them to recognized hazards for the purpose of injuring them. The court felt the evidence showed only negligence on the part of the employer and that, absent the required element of specific intent, the injury was exclusively compensible by the worker's compensation system.10

The three cases were consolidated for the Ohio Supreme Court to determine two issues. The first concerned the definition of the term "intentional tort." Because the plaintiff's were all suing their employer for damages in addition to worker's compens-

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9Jones v. V.I.P. Development, Case No. 84-139
10Hamlin v. Snow Metal Products, Case No. 84-409

ation benefits, success or failure in proving the requisite intent was crucial. A prior Supreme Court holding already had established that the receipt of workers' compensation benefits does not preclude an employee from pursuing common law remedies against an employee for intentional torts.11

In Jones, the Court broadened the concept of intentional tort to include not only those consequences that are specifically intended, but also those consequences the employer believes are substantially certain to follow from his acts. Therefore, after Jones, an employee no longer must meet the strict standard of a specific intent to pursue a common law action against the employer. This "implied intent" is now sufficient for the employee to recover from the employer.12

The plaintiff must show only that the defendant knew or reasonably believed that harm was a substantially certain consequence of his acts. If the plaintiff succeeds in this showing, the court will infer an intent on the part of the employer to injure the employee. The test of this implied intent is whether the employer knew, or reasonably should have known, of the creation of a substantial risk of injury.

In the first of the three consolidated actions, the Court ruled that an employer who fails to warn of a known defect which poses a serious threat of injury may be considered to have acted despite a belief that harm is substantially certain to occur.

11Blankenship v. Cincinnati Milacron Chemicals, 69 Ohio St.2d 608 (1982)

12Jones at 1051

Thus, inaction in regards to a known danger can be viewed in the same light as actions taken that result in injury.13

In the second action, the Court ruled that the complaint contained sufficient allegations of intentional misconduct under the new standard to create a reasonable doubt in the minds of the average juror so as not to be dismissed on a motion for summary judgment. Summary judgment is appropriate when the judge determines there is no issue in controversy requiring jury consideration (reasonable minds could not differ on the matter).

The allegations in the complaint stated that the employer "knew, or should have known," that the employee would be subjected to substantial risks yet failed to take action to make the area safe. The complaint also alleged that the employer failed to warn of the danger once knowledge of the risk was acquired. These allegation were sufficient in the eyes of the Supreme Court to create an issue upon which reasonable minds could differ.

Therefore, in order to proceed with a common law action, an employee need only allege that the employer knew of the risk and allege that the employer took no action to prevent the resulting injury. This imposes a substantial burden on the employer even in the absence of a valid claim as he is nevertheless obligated to develop a legal defense. This can represent a major expense in and of itself, one which would not have arisen under the pre-Jones workers' compensation system.

13Jones, at 1052

ELECTION OF REMEDIES

In Davis v. Rockwell International, the Federal District Court analyzed a similar circumstance in precisely the same manner as the Ohio Supreme Court. The court interpreted existing Ohio law as not requiring an employee to prove a specific intent to injure, but that a failure to warn of a known danger may amount to intentionally tortious conduct. The presence of this intent is a question for the jury and dismissal prior to their consideration is inappropriate.

The court noted that one of the purposes of the Act, providing for a safe and healthy work environment, would not be fulfilled if an employee could commit intentional torts having only to worry about increases in workers' compensation premiums.

The federal court also resolved the second issue, whether receipt of workers' compensation benefits precludes an employee from pursuing a common law action against the employer, in precisely the same manner as the Supreme Court in Jones and Blankenship. The doctrine of election of remedies has as its purpose preventing multiple recoveries and preventing a party from pursuing in one action what was rejected in a prior action.[14] The court noted that this doctrine was a harsh rule and not favored in Ohio.

The prerequisites to the application of the doctrine include the existence of two or more remedies, inconsistency between the

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[14]United States v. Thomas, 709 F.2d 968,971 (5th Cir.,1983)

two, and a choice of one in a prior action.[15] In Jones, the Court noted that workers' compensation benefits are designed to protect against negligent and reckless conduct, and common law recoveries are designed to compensate for intentionally tortious acts. Therefore, the two are not inconsistent and the receipt of workers' compensation benefits does not constitute an election of remedies.

The Supreme Court stated that viewing the receipt of benefits as a forfeiture of the employee's common law rights of action would not only be harsh and unjust, but that it would frustrate the purpose of the Act and run contrary to previous Supreme Court rulings. In addition, such a rule would allow the employer to escape meaningful responsibility for safety abuses. The Court in a prior decision held that protection under the workers' compensation system was always for negligent and reckless acts and not for intentionally harmful conduct.[16]

Finally, the Supreme Court in Jones ruled that the employer is not entitled to a set-off in the amount of the workers' compensation benefits awarded to the employee due to the employer's intentionally tortious conduct. Due to the absence of identity between the two recoveries, the Court held them to be separate awards for separate claims with no direct relationship.

The Ag community is not immune from such lawsuits. As of this date, there are at least two lawsuits pending in Ohio

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[15] 25 Am.Jur.2d, Election of Remedies, Secs. 8,22,and 23
[16] Blankenship, 69 Ohio St.2d 608

in which an employee is suing a farmer for injuries previously compensated for by workers' compensation. Both lawsuits involve the application of this new "intentional tort" theory and both plaintiffs are asking for damages in excess of $2 million.

One of these lawsuits sounds very much like the facts in Gains v. City of Painesville, one of the three consolidated cases decided in Jones. The farmer had removed the safety shield from the power takeoff on his tractor because the hay bailer would not function properly with it in place. The employee had been warned of the modification and the danger inherent in the system on several occasions, including the day of the accident.

Contrary to the warnings, the employee dismounted from the tractor with the power takeoff engaged, his pant leg became entangled in it, and his leg was severed just below the knee. At the time of the accident he was receiving $100 per week for odd jobs around the farm; he is now receiving over five times that amount in workers' compensation benefits. In addition to this permanent, partial disability award, the employee is seeking $2 million from the man he claimed had helped him more than anyone else in his life.

INSURANCE AS A PROTECTIVE MEASURE

Employers are now faced with the question of how they are to protect themselves and how to obtain insurance against this type of recovery. Business liability insurance coverage does not provide for intentional tort judgments. Once a court determines that an employer is liable for an injury resulting from intent-

ionally tortious conduct, the standard business liability policy ceases to be of assistance in providing financial protection.

Virtually all business liability policies provide a legal defense against employee lawsuits regardless of the theory underlying the suit. However, in the example illustrated abioive, the farmer has been forced to bring suit against each of his two insurance companies in an attempt to force them to provide a legal defense. Employers should review their policy or consult their agent to determine if they are provided such a defense.

At least one insurance company offers a policy in addition to the traditional business liability insurance that they claim will cover a judgment based on this new theory of intentional tort. This "stop gap" policy is priced at a percentage of the employer's workers' compensation premium and it's cost is somewhat prohibitive.

This type of policy is offered with the express written reservation that the court may not allow coverage under certain circumstances. One insurance company is quick to point out that some courts in Ohio have stated indirectly that allowing an insurance company to pay an intentional tort judgment against an employer would be contrary to public policy. These awards have been viewed as punitive in nature and allowing an insurance company to pay the judgment would eliminate the effect of this "slap on the wrist."

Employers should contact their insurance agents and deter-

mine if they are covered in the event of such an accident and if the policy will provide the insured a legal defense to a subsequent lawsuit. If a positive representation is obtained, the discussion should be summarized in a letter to the agent sent by the employer seeking an affirmation of the representation. Should the situation arise, these correspondences can be used as evidence that the company represented to the employer that coverage would be provided and might convince the court to mandate such coverage.

SELF HELP PROTECTION

Self help and increased awareness appear to be the most effective means by which an employer can prevent economic disaster from "intentional" tort liability while at the same time improving the working conditions of the employee.

First, an employer should inspect all equipment to be assured that all safety devices are in place and functioning properly. If not, special steps must be taken to repair or replace the item or find some sort of substitute safety apparatus. Warning labels and instructional writings must be in place, clean, and legible. If not, replacements must be sought or the reason for their illegibility eliminated.

Second, all employees must be trained in the operation of all equipment from the simplest to the most complex. Though seemingly unnecessary, this training should be conducted thoroughly and documented, including the signatures of all trained

employees. This documented training should include instruction not only as to any special modifications or circumstances, but also as to the simplest routine use of the machinery. These suggestions, taken together, create evidence that can be crucial at trial in convincing the jury that he actively attempted to warn the employees and to prevent any foreseeable accidents.

In addition, employers should not hesitate to discipline an employee for improper use of the equipment. This discipline should be documented, signed and progressive. If a certain point is reached where the employer can be discipline no further, then the employee should be suspended or released. Otherwise, a court may find the employers' acts were insufficient in the face of known dangers.

It may be advisable to do as a farmer in Northwest Ohio has done and conduct a "tour" of the operation to identify all potentially hazardous areas. This inspection should be conducted with all employees and their suggestions and comments should be solicited, noted, and followed up. These measures may sound childish, but the door to umlimited liability is wide open and the employer must utilize every means by which to protect against such a ruinous lawsuit under the new theory.

PENDING LEGISLATION

There has been legislation introduced in the General Assembly addressing this issue. Senate Bill 155 was specifically designed to reverse the theory developed by the Ohio Supreme Court in Jones. The intent required under this proposed legisla-

tion was phrased in terms of a "specific, deliberate intent to cause the resulting injury." Specific, deliberate intent means that the employer acted with a consciously, subjectively, and deliberately formed intention and purpose to cause the specific resulting injury or death.

The wording was quite strict and both proponents and opponents of the bill were quite forceful in making their positions known during the Senate hearings. Employer groups are concerned about the potential exodus of corporations from Ohio due to their fear of financial disaster as a result of this liberalized exclusivity rule. Farm organizations are keenly interested in the passage of the bill because of the impact of Jones upon the high risk agriculture industry.

Two bills had been introduced in the Ohio House of Representives regarding the workers' compensation system (H.B. 423 and H.B. 424). House Bill 423 limits the receipt of workers' compensation benefits to injuries sustained on the employer's premises or while in a vehicle under the control of the employer. More on point is House Bill 424, designed to bar employees who receive workers' compensation benefits from suing their employer and barring employees from receiving workers' compensation benefits if they elect to sue their employer at common law.

All three of these bills were tabled indefinitely in lieu of the findings of a specially empaneled "Blue Ribbon" Commission on workers' compensation. The Commission, established by the

General Asembly was supposed to conduct hearings on the status of workers' compensation in Ohio and make recommendations by November, 1, 1985 for implementation on January 1, 1986.

After several heated sessions, the Commission found the two sides of the issue to be at loggerheads and dismissed the parties to draw up proposals for submission. The Commission then intended to magically mesh the two proposals into one recommendation to solve the problems faced by workers' compensation. However, after the proposals were submitted, the Commission concluded their task was impossible and adjourned themselves forever.

A bill has now been introduced in the House of Representatives (H.B. 73) and one is being drafted for submission in the Senate (authored by Sen. Richard Finan) designed to resolve the problem of workers' compensation. As stated, the courts, including the Supreme Court of Ohio have sustained the holdingh in Jones v. V.I.P. Development and show no inclination of modifying the new theory whatsoever. Action in the General Assembly is the only viable option available for reaching a solution on the issue and all attention and input should be focused accordingly.

CONCLUSION

The agricultural employer subject to the workers' compensation must be aware of these recent developments in the law of workers' compensation. The relaxed exclusivity rule make it much easier for an employee to recover both from the workers' compens-

ation system and directly from the employer. In addition, the new definition of "intentional tort" jeopardizes the protection once provided by the system.

Additional protective measures must be taken to protect against injuries that may be viewed as resulting from the "intentional" acts of the employer. If the court views acts as intentional, neither workers' compensation nor other traditional business liability insurance will protect the employer from potentially disastrous judgments.

Though these results seem inequitable, the Supreme Court has upheld this new rule in similar lawsuits since Jones involving similar circumstances.[17] Legislation is pending to correct these changes in the law, but employers should take steps to protect themselves now.

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[17]Bradfield v. Stop-N-Go Foods, Inc., 17 Ohio St.3d 58 (1985, revid on authority of Jones)